U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29853630

Date: FEB. 14, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner, a dancer, seeks classification as an individual of extraordinary ability in the arts. Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner has a level of expertise indicating that she is one of the small percentage who have risen to the very top of her field of endeavor. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

An individual is eligible for the extraordinary ability classification if they have extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and their achievements have been recognized in the field through extensive documentation; they seek to enter the United States to continue work in the area of extraordinary ability; and their entry into the United States will substantially benefit prospectively the United States. Section 203(b)(1)(A) of the Act.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then they must provide documentation that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner

to submit comparable material if they are able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to the individual's occupation.

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

Because the Petitioner did not indicate or establish that she has received a major, internationally recognized award, she initially sought to demonstrate her eligibility by submitting evidence related to the following regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x):

- (i), Receipt of lesser nationally or internationally recognized prizes or awards;
- (ii), Membership in associations that require outstanding achievements;
- (iii), Published material about the Petitioner in major media;
- (iv), Participation as a judge of the work of others;
- (vii), Display of the Petitioner's work at artistic exhibitions,
- (viii), Leading or critical role for organizations with distinguished reputations; and
- (ix), Commanded significantly high remuneration in comparison with others in the field.

The Director's notice of intent to deny (NOID) concluded, without explanation, that the Petitioner met the criteria regarding published material, participation as a judge, and display at artistic exhibitions, but did not meet the other four requested criteria. Because the Petitioner had satisfied the required three initial criteria, the Director conducted a final merits determination which only discussed the evidence for those three criteria, and then requested further documentation establishing the Petitioner's eligibility for the four criteria that were denied, as well as her overall record of sustained national or international acclaim.

The Petitioner provided a timely response to the NOID, and the Director denied the petition, concluding without any explanation that the Petitioner had not met any additional criteria and repeating the NOID's final merits analysis.

Remanding a matter is appropriate when the Director does not fully explain the reasons for the denial so that the affected party has a fair opportunity to contest the decision and we have an opportunity to conduct a meaningful appellate review. 8 C.F.R. § 103.3(a)(1)(i) (providing that the director's decision must explain the specific reasons for denial); *c.f. Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that the reasons for denying a motion must be clear to allow the affected party a meaningful opportunity to challenge the determination on appeal).

On appeal, the Petitioner contends that no reason was given for why she did not meet the criteria regarding lesser nationally or internationally recognized awards, membership in associations, leading or critical roles, or her remuneration, and that the Director's final merits analysis did not consider the

totality of the record. Because the Petitioner met the initial evidentiary requirements with evidence corresponding to three of the criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) and has proceeded to the final merits determination, the four unmet criteria are not material to the outcome of this case. However, a final merits determination under *Kazarian* must consider the totality of the evidence, not only the evidence corresponding to criteria that have been satisfied. *Kazarian*, 596 F.3d at 1119-20; *see generally* 6 *USCIS Policy Manual* F.2(B)(2), https://www.uscis.gov/policy-manual. The record here includes letters of support, awards, salary documents, and various other documentation the Director did not address in the NOID[1] or denial notice.

We further note that the Director's denial did not evaluate the contents of the attorney letter provided in response to the NOID. While the Director correctly noted that attorney statements are not considered evidence in and of themselves,[2] such statements do make legal arguments regarding the evidence, which the Director must address in any denial notice in order to specifically explain the reasons for that denial. 8 C.F.R. § 103.3(a)(1)(i).

Because the Director did not analyze much of the Petitioner's evidence or arguments, the denial notice is insufficient to allow her a fair opportunity to challenge the decision or for us to conduct a meaningful appellate review. We will therefore remand this matter to the Director to consider again whether the overall record demonstrates that the Petitioner has sustained national or international acclaim and that she is one of that small percentage that has risen to the very top of her field.

On remand, the Director shall weigh and review all of the evidence presented, including the materials submitted on appeal. The Director may request any additional evidence considered relevant to the new determination and any other issues. We express no opinion regarding the ultimate resolution of this case on remand.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[1] 8 C.F.R. § 103.2(b)(8)(iv) (stating that a NOID must, among other things, state "bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond"); *see generally* 1 *USCIS Policy Manual*, *supra*, at E.6(F)(4) (stating that NOIDs should "[i]dentify the reasons for the intended denial, including the eligibility requirement(s) that has not been established, and why the evidence submitted is insufficient").

[2] *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1988) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").